Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the special tax provisions applicable only to association lobbying, 26 U.S.C. § 162(e)(3) and § 6033(e), penalize association lobbying in a manner inconsistent with the speech, association and petition rights guaranteed by the First Amendment of the United States Constitution and the equal protection guarantee of the Fifth Amendment of the United States Constitution?

2. Whether an association's limited ability to adopt a dual structure, subject to the Internal Revenue Service's regulation permitting the Secretary to ignore that structure, adequately provides associations with a means to place themselves under a generally applicable tax scheme that does not burden association lobbying by comparison with other activities?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties before the United States Court of Appeals for the District of Columbia Circuit.

American Society of Association Executives ("ASAE"), a not-for-profit professional society. ASAE has no parent corporation and does not issue stock.

United States of America

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PETITION FOR WRIT OF CERTIORARI

Petitioner American Society of Association Executives ("ASAE") respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, which upheld federal provisions that impose special tax burdens on association lobbying that are not imposed on any other activities, including lobbying by other speakers. Contrary to that court's decision, a dual structure will not insulate association lobbying from the affirmative tax burdens these provisions impose.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reprinted at Pet. App. 1a.

The decision of the United States District Court for the District of Columbia is reprinted at Pet. App. 11a.

JURISDICTION

ASAE brought this suit in the United States District Court for the District of Columbia, which properly exercised jurisdiction under 28 U.S.C. § 1331 and § 1340. The district court's decision was timely appealed to the United States Court of Appeals for the District of Columbia Circuit, which issued its opinion and judgment on November 9, 1999, and its mandate on December 30, 1999. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions, the pertinent portions of which are set forth below:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend V. The pertinent portions of the statutory provisions challenged as inconsistent with these constitutional provisions, 26 U.S.C. §§ 162(e) and 6033(e) are reprinted at Pet. App. 30a-34a.

STATEMENT OF THE CASE

Background. In the decades since Congress first enacted an income tax, the federal government has taken various approaches with respect to lobbying – at times providing a tax subsidy, at other times declining to provide a tax subsidy by classifying some or all types of lobbying expenditures as non-deductible. In the Omnibus Budget Reconciliation Act of 1993, Congress changed the tax rules applicable to lobbying expenditures in two ways. Congress withdrew the remaining subsidy for lobbying expenditures from commercial businesses by reclassifying direct lobbying expenditures as non-deductible. In addition, Congress imposed a special set of tax rules on associations that lobby – the "special interest groups" that had been lambasted by Ross Perot and now-President Clinton in the 1992 campaign – systematically imposing more of a tax bite on association lobbying than if Congress had simply removed the former tax subsidies for lobbying and subjected associations to generally applicable income tax provisions.[1/] *See* Pet. App. 32a-34a. ASAE challenged this special tax scheme because that additional "bite" imposes an affirmative financial disincentive to the exercise of fundamental rights of speech, association, and petition and imposes higher taxes on association lobbying than on other activities, including lobbying by others.

1/ The challenged tax provisions were enacted the following year, after President Clinton challenged Congress in his State of the Union Address, to "deal with the undue influence of special interests." *The State of the Union: President Clinton's Address*, Washington Post, Feb. 18, 1993 at A24.

The statute. The challenged tax provisions, 26 U.S.C. § 162(e)(3) and § 6033(e), Pet. App. 30a-34a, apply to all not-for-profit corporations organized under 26 U.S.C. § 501(c), other than § 501(c)(3) organizations (*e.g.*, charities). Professional societies are subject to these special tax provisions, as are trade associations, advocacy groups, labor unions, and many other not-for-profit corporations (hereafter "associations"). The tax provisions require such associations, if they lobby, to choose between two alternatives. Under the "proxy tax" alternative, the association must pay tax on the income it spends to lobby. Under the "flow-through" alternative, the association's members must pay income tax on the association's lobbying expenditures. Both alternatives impose a higher tax – often significantly higher – than if Congress had simply reclassified the income spent to lobby as taxable.

The proxy tax imposes a *flat* tax of 35 percent on an association's lobbying expenditures. The rate applies without regard to the amount expended, the association's other taxable income,[2/] or the association's overall net income. § 6033(e)(2)(A). Thus, the tax is structured quite differently from the income tax scheme applicable to other corporations and to other taxable income of associations, and results in a far higher tax. The ordinary corporate income tax provisions impose a graduated tax ranging from 15 to 35 percent of net income. Only corporations with net incomes

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2/ Although associations subject to the special lobby tax are generally referred to as tax-exempt corporations, organized under 26 U.S.C. § 501(c), Congress has only granted an exemption for some of their income. Any income classified as "unrelated" to their primary purposes, *e.g.*, income from sales of advertisements in their publications, is subject to the ordinary corporate income tax. *See* 26 U.S.C. § 511 *et seq.* (Unrelated Business Income Tax, or "UBIT").

greater than $18.33 million pay an effective flat tax of 35 percent. Under these generally applicable rules, no association would pay a flat tax of 35 percent because none have a taxable income (including lobbying expenditures), or even a net income, of more than $18.33 million. At least 90 percent of associations would pay only a 15 percent tax on their lobbying expenditures. J.A.-56. As a result, the proxy alternative rules exact far more tax than if Congress had simply reclassified lobbying expenditures as taxable and subject to ordinary income tax rules – as Congress did with respect to lobbying expenditures by commercial corporations. *See* Pet. App. 4a.

The flow-through alternative consists of a series of tax rules that are also structured differently from the generally applicable income tax and impose a higher tax than would be imposed had Congress simply reclassified member contributions to lobbying non-deductible. The flow-through rules reclassify all or part of members' dues and other contributions as non-deductible and thus subject to income tax, but the amount reclassified does not, and is not intended to, reflect the portion of members' dues actually spent to lobby. For example, the allocation rule, § 6033(e)(1)(C)(i), requires all lobbying expenditures to be treated as if they are funded by dues, even if – as is typical – some or most are funded with income the association earns from sales of goods or services.[3/] The rule is not crafted as a safeguard against accounting manipulations that would otherwise shield dues

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3/ ASAE, for example, like most mature associations derives 70 to 80 percent of its income from sources other than member dues. J.A.-56.

spent to lobby.[4/] Congress chose instead to shift the entire tax responsibility for an association's lobbying expenditures to its members, without regard to how much of the lobbying is funded with members' dues and how much with income the association earns from business activities. Because most associations have such additional business income, the vast majority of association members lose a deduction (and therefore pay tax) not only on the amount *they* contribute to lobbying but also on additional dues, reflecting the shift of tax liability for lobbying expenditures funded from the association's independent income from the association to its members. The additional dues subjected to tax by the allocation rule are dues spent on otherwise deductible business activities, not lobbying, and would be deductible but for the association's decision to lobby. A corollary rule requires that if an association, using non-dues income, spends more to lobby than it collects in dues, the "excess" must be applied to dues paid the following year to reduce or eliminate the deduction available to that year's members. *See* § 6033(e)(1)(C)(ii) ("carryover rule").

In addition, the flow-through alternative has peculiar timing requirements, which are unlike those of the general income tax, and which result in a higher tax than would the general income tax. Associations must notify members as to the portion of their dues that is non-deductible, but they may not do so at the end of the tax year when the association can

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4/ The IRS has long relied on such safeguard rules, either requiring taxpayers to prove the portion of their dues that were not used to lobby, or apportioning lobbying expenditures to dues in light of the association's total income or expenses.

accurately make that calculation.[5/] Instead, the rules require associations to notify each member when his dues notice is sent – often a year or more earlier than the association can determine its total lobbying expenditures or dues receipts for the year. § 6033(e)(1)(A)(ii). Associations are also not permitted to substitute a corrected calculation when the relevant information is in hand – even though associations have that information before taxes are due, and predictive error in either direction results in additional tax liabilities.

If the association overestimates the amount, because it lobbies less than expected, the members are required to pay tax on that amount anyway. In other words, the members are required to pay tax on more lobbying expenditures than occurred. There is no recourse; the excess tax payments are simply forfeited.[6/] Pet. App. 5a. If an association errs in the other direction, by underestimating the amount because it had not foreseen legislative or other government initiatives that arose, the association must pay a flat 35 percent tax on all expenditures above the amount estimated. § 6033(e)(2)(A)(ii). There is a recourse for this underestimation penalty, but its availability is entirely within

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5/ Under the allocation rule, associations must divide their total lobby expenditures for the year by their total dues receipts for the year to determine the percentage of each member's dues that is not deductible (*i.e.*, total lobbying expenditures ÷ total dues receipts x individual member's dues). The timing rules require associations to use estimates for both total lobbying expenditures and total dues, long before the actual numbers are known.

6/ Congress was aware of the forfeit imposed by overestimation, and drew it to the attention of the Secretary of the Treasury. *See* 139 Cong. Rec. H5948 n.18 (daily ed. Aug. 4, 1993). Nothing in the Act, however, directs the Secretary to address this problem, and the Secretary has not done so.

the discretion of the Secretary of the Treasury. § 6033(e)(2)(B). The Secretary is permitted, but not required, to waive the 35 percent excise tax and permit an association that had underestimated lobbying to include the amount that was underestimated in its next year's estimate. However, the Act provides no standards to limit or guide the agency's discretion in granting this waiver, nor has the Secretary adopted any such standards.

Proceedings. ASAE brought this suit on May 15, 1995, pursuant to 26 U.S.C. § 6532(a)(1), after requesting a refund from the IRS for lobby taxes paid for fiscal year 1994, challenging the special lobby tax scheme applicable to associations as a violation of the First Amendment and of the equal protection guarantee of the Fifth Amendment.[7/] The district court granted summary judgment to the government on October 29, 1998, based on its determination that rational basis scrutiny was appropriate because the scheme was generally directed at withdrawing a tax subsidy and precision in doing so is not required. Pet. App. 24a. The district court also found that the provisions were not content-based even

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7/ ASAE, with ten other associations, initially brought suit for declaratory and injunctive relief before the challenged provisions went into effect. The district court held that the challenge did not fall within an exception to the Anti-Injunction Act on the ground that plaintiffs had an alternative means to challenge the tax scheme. *See ASAE v. Bentsen*, 848 F. Supp. 245, 250 (D.D.C. 1994). The alternative means identified by the court was to decline to send notifications to members and thereby incur a proxy tax liability. The association could then either pay that tax and request a refund which would be denied or it could wait to be assessed, then challenge the applicable agency decision in court. ASAE pursued the remedy outlined by the court. It paid $56,900 proxy tax for fiscal year 1994, requested a refund on constitutional grounds, and after six months without a response from the IRS, filed suit.

though they applied only to speech about legislation, and that ASAE was not entitled to challenge the constitutionality of the statutory scheme that required it to make a choice between two options, but could challenge only the option chosen. *Id.* at 22a-23a, 26a-28a.

The D.C. Circuit did not confirm the district court's findings of fact or its findings of law. The court affirmed the decision on the ground that the reasoning adopted by this Court in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) ("*TWR*"), in upholding a different tax scheme applicable to charitable organizations applied in the same way here. The court held that associations subject to the special lobby tax provisions may avoid the aspects of the tax challenged as unconstitutional by splitting into two associations, one that lobbies and one that does not. Pet. App. 6a. In doing so, the court presumed that the lobbying association would be funded entirely from dues and contributions. *Id.*

The court recognized that the Department of the Treasury had adopted a regulation that permits it to ignore the manner in which an association structures its activities if the Department determines, in its discretion, that the activities are structured "with a principal purpose of achieving results that are unreasonable in light" of the challenged provisions. *Id.* at 9a (quoting Treas. Reg. § 1.162-29(f)). The court did not, however, restrict the power of the Department to disregard a dual structure where the lobbying association obtained at least some income from sources other than dues and contributions. *Id.*

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the constitutional rights burdened here are ones for which "[t]he First Amendment affords the broadest protection." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The challenged provisions impinge upon associations' exercise of the right to comment upon matters of public importance that are being debated in the legislature and in the highest echelons of the Executive Branch. It impinges upon their right to comment to the decisionmakers, their staff members, and the association's own members. The Court's review is needed to protect this "core value of the Free Speech Clause of the First Amendment," *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968).

Notwithstanding the decision below, associations cannot shield themselves from these burdens on protected rights by dividing into a lobbying and a nonlobbying organization, as delineated in *TWR* with respect to charities. The Department of the Treasury has conferred upon itself the authority to disregard such dual structures, and to reimpose the challenged provisions as if the two organizations were one. *See* Treas. Reg. 1.162-29(f). The only exception permitted by the Department imposes a significant restriction on expenditures for protected speech.

Second, absent this Court's involvement, the decision below will have widespread impact, and will likely be the final decision on the question. The challenged provisions affect more than half a million organizations, every year,

continuously for the foreseeable future.[8/] Petitioner is an umbrella organization serving executives of many nonprofits and brought this challenge not only to vindicate its own rights but as a test case for the entire association community, which is closely watching the proceedings.

If the Court declines to review these provisions now, it is unlikely to have a later opportunity to do so. The obstacles to bringing suit are considerable. In order to qualify to bring suit, an association must choose to pay a 35 percent flat proxy tax itself rather than shift a different tax to its members. The association would then have to file a refund request, which under IRS policies, automatically subjects the association to an audit review.[9/] Whatever the outcome of the audit, the proceedings themselves impose significant costs and uncertainties on associations, costs and uncertainties that can be expected to deter any additional associations from undergoing the steps necessary to challenge these provisions in court. Further, there is little an association would reasonably expect to gain, after this Court declined to review the decision in this suit, by challenging the same provisions in another suit. The constitutional challenge at issue is presented squarely and cleanly in this

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8/ According to Internal Revenue Service data, in 1994, there were 538,853 organizations qualified under federal tax-exempt provisions other than § 501(c)(3) (the provisions apply to all organizations qualified under federal tax-exempt provisions other than § 501(c)(3)), if they lobby. *See Nonprofit Almanac, Dimensions of the Independent Sector, 1996-97* 38 (Independent Sector 1997).

9/ *See Internal Revenue Service Manual* Pt. IV, § 4512.1 ("Examination or other audit action will be initiated on claims for refund within 30 days after receipt of the claims and any related returns..."). In response to filing its request for refund precedent to filing this suit, petitioner was subjected to an audit lasting almost four years.

suit. The issues are purely legal. No different individual association facts would bear on the relevant questions.

I. THESE SPECIAL TAX RULES ARE INDEFENSIBLE PENALTIES ON ASSOCIATION LOBBYING, INCONSISTENT WITH THIS COURT'S FIRST AMENDMENT DECISIONS.

The challenged tax provisions do not fall within the area of legitimate government action that this Court has demarcated – in which Congress withdraws a formerly available tax exemption or tax deduction from protected First Amendment activities, with the effect of subjecting such activities to generally applicable tax laws. *See Cammarano v. United States*, 358 U.S. 498 (1959), *TWR*, 461 U.S. at 544-45. Congress could here have fully withdrawn tax subsidies for lobbying that had previously been available to associations and their members, consistent with this Court's decisions, by reclassifying income spent for association lobbying from tax-free to taxable and therefore subject to the generally applicable income tax scheme. The provisions made applicable to commercial businesses do precisely that. They reclassify income spent to lobby as non-deductible, and therefore subject to tax at the company's ordinary rates. *See* 26 U.S.C. § 162(e)(1).

Congress could have treated associations exactly the same as it treats commercial businesses, and reclassified all association funds spent to lobby as taxable to the association, and therefore subject to the corporate income tax. Alternatively, Congress could have recognized that associations have two sources of funding – (1) dues and other contributions from members, and (2) business income earned from the sale of goods and services – and reclassified

lobbying expenditures from each as taxable under the ordinary tax provisions. Thus, dues and contributions *actually* spent to lobby could have been made non-deductible to members, and association business income spent to lobby could have been taxable to associations. These methods were well-known to Congress,[10/] but do not appear to have even been considered by Congress during the period it contemplated these changes to the tax code – a period when lobbying by special interest groups was being vilified as harmful to government and the country.[11/] Either regulatory choice would have been far less intrusive on the speech, petition, and associational rights of associations and their members than the challenged provisions, and would equally have achieved the only asserted congressional goal.

The provisions Congress enacted instead impose a higher tax on association lobbying than is imposed by the

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10/ When Congress decided to withdraw the tax subsidy for association income from business activities that were not closely related to the purpose of the association, it simply reclassified such income as taxable, which subjected it to the ordinary corporate income tax. *See* 26 U.S.C. § 511 *et seq.*. Similarly, for decades, any portion of member dues *actually* spent to influence the public about legislative initiatives ("grassroots lobbying") or contributed to political campaigns has been classified as non-deductible and taxable to the members. *See* 26 U.S.C. § 162(e) (1963); Treas. Reg. 1.162-15(c)(2) (1960).

11/ *See, e.g.*, Joel Brinkley, *Special Pleaders*, N.Y. Times, July 30, 1993, at A12 (viewing lobby tax rules as response to negative publicity blaming "'special interests' for much of what was wrong in Washington"). Indeed, the Department of the Treasury understood Congress to have enacted the special lobby tax provisions applicable only to associations in order "to discourage special-interest lobbying." United States Dep't of the Treasury, "Proposed Lobbying Regulations," Press Release issued May 10, 1994 (describing Congress's purpose in enacting the provisions).

generally applicable income tax on other activities, or even on lobbying by other speakers. Associations and their members are subjected to affirmative penalties if the association lobbies. Under the proxy tax alternative, associations must pay tax on income used to lobby under a far higher tax rate than any other corporation pays on any taxable income under the generally applicable income tax. For 90 percent of associations, the penalty for lobbying is a tax 233 percent higher than the rate that would be applicable under the ordinary corporate income tax. As the court below found, the government's only defense of this extraordinarily high tax rate – even if it were correct, which it is not – fails to justify it. Pet. App. 5a.

The flow-through alternative imposes even more arbitrary penalties. If an association lobbies, its members must pay income tax on income they never received and to which they were never entitled. Under the allocation rule, members are liable for tax on every dollar the association spends to lobby, whatever its source. Thus, members are required to pay income tax not only on the money they provide that is spent to lobby, but also on income the association earns through the sale of goods and services that it spends to lobby. This results in an extra tax bite on almost every member of an association that lobbies, because almost every association earns non-dues income from business activities such as educational seminars, sales of technical publications, conventions, etc.[12/] Some of this non-dues

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12/ Had ASAE, for example, chosen the flow-through alternative in the tax year at issue, its members would have been required to pay tax on 4.3 percent of their dues. However, because ASAE derives almost 80 percent of the money it spends on its activities from non-dues sources, only 20 percent of its activities, including lobbying, are actually paid for with dues income, so that only 1 percent of its members' dues were spent

income is also taxable under the Unrelated Business Income Tax (or UBIT) provisions, § 511 *et seq.* Therefore, any lobbying paid for with unrelated business income is taxed twice – once under UBIT and a second time under these special lobby tax provisions – either the proxy tax or the flow-through alternative – an additional penalty.[13/]

The corollary "carryover" rule takes these arbitrary requirements even further, when an association spends more to lobby than it collects in dues, by imposing tax for the "excess" on the association's following year's membership. This is not simply a method of ensuring that associations cannot avoid the tax by prepaying lobbying expenses the year

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to lobby. The allocation rule, however, withdraws a deduction from more than four times the amount of dues actually spent to lobby. The difference between the 1 percent and the 4.3 percent are dues that were spent on activities, such as educational programs and technical publications, that are fully deductible to members of associations that do not lobby, and to commercial businesses. Thus, the effect of the allocation rule is to withdraw a deduction from otherwise deductible activity *if* the association lobbies. In the tax year at issue, less than one-quarter of the dues that would have been rendered non-deductible, and thus subject to tax, would withdraw the former tax subsidy for lobbying. More than three-quarters of the amount subjected to tax would have been pure penalty for association lobbying. J.A.-54, 57.

13/ The allocation rule does not serve to ensure against associations using accounting manipulations to protect dues from any tax, because it makes no attempt to fairly apportion the amount of dues that can legitimately be attributed to lobbying. Several such measures exist, and the government has relied on them in the past. For example, the association's lobbying expenditures could be compared to its total expenditures, and the ratio derived used to determine what percentage of dues can reasonably be claimed to have been spent to lobby. *E.g.*, if one-quarter of an association's expenditures is for lobbying, then one-quarter of its dues income would be regarded as spent to lobby, and therefore non-deductible.

before the lobbying is actually conducted, *cf.* Pet. App. 2a-3a. The carryover rule applies regardless of whether an association has prepaid lobbying expenses; it also applies in the far more typical situation when an association pays for some portion of its lobbying, in the same year the lobbying is undertaken, with its independent business income. Further, the rule arbitrarily presumes that all dues are available to be spent for lobbying, when in fact the costs of collecting dues and attracting members significantly reduce an association's net dues income available to be spent on any other activity – including lobbying. As a result, the "carryover" rule not only penalizes members of associations that spend non-dues income to lobby, it also penalizes those who join an association that undertook a substantial amount of lobbying the year before.[14/]

The peculiar estimation rules – which do not permit associations to correct inaccurate estimations, even though associations receive the necessary information to correct the earlier estimations before the tax becomes due – impose additional tax "bites" that are also unnecessary to withdraw former tax subsidies for lobbying. Moreover, the rules impose these additional tax bites whether the estimation is too low *or* too high. Overestimation imposes an unwarranted forfeit for members, and underestimation generates a flat 35 percent tax liability for the association. Because lobbying expenditures are as inherently unpredictable as the legislative and administrative processes themselves, these provisions guarantee – in virtually every case – that associations or their members will pay more tax than under a rule that simply

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14/ Most associations experience some turnover in their membership each year. Annual turnover rates of 10 to 25 percent are not uncommon. J.A.-55.

reclassified lobbying expenditures as taxable and subjected them to the ordinary tax scheme. These Catch-22 rules make the only safe choice for associations one of deliberately underestimating lobbying expenditures by a significant amount and then becoming silent – with members of the government and with its own members – as soon as the estimate is reached, regardless of the legislative or executive initiatives that arise.

This inducement for associations to constrain their constitutionally protected political activity within the confines of forecasts made long in advance is particularly perverse from a constitutional perspective. It encourages associations to curtail their lobbying altogether or postpone it until the following year when it may be less effective or entirely too late. *See, e.g., Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (noting that, for political speech, "the element of timeliness may be important"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (government-induced delay of political expression "for even minimal periods of time, unquestionably constitutes irreparable injury").

These provisions are inconsistent with this Court's settled jurisprudence that affirmative tax burdens on First Amendment activities are presumptively unconstitutional. *See Grosjean v. American Press Co.*, 297 U.S. 233, 248, 251 (1936); *Speiser v. Randall*, 357 U.S. 513 (1958); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *TWR*, 461 U.S. at 545; *Cammarano*, 358 U.S. at 513. The fact that the Department of the Treasury drafted, and Congress enacted, this special tax scheme for association lobbying during a period of intense hostility to associations' exercise of the very rights at

issue raises particular concerns. But even if Congress was genuinely attempting only to withdraw a former subsidy, it was without power to enact these provisions because they withdraw additional benefits if associations exercise their First Amendment right to lobby. *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (invalidating law denying funding to public television stations that broadcast editorials, because it resulted not only in denial of grants for editorials, but also for "noneditorializing broadcast activities" as well). Moreover, these tax provisions impose financial burdens on speakers because of the content of their speech. Only speech on proposed legislative or executive initiatives is targeted, in derogation of this Court's consistent view of the presumptive invalidity of content-based discrimination. *See, e.g., Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (the content of speech as the basis for imposing a tax is entirely incompatible with the First Amendment); *Burson v. Freeman*, 504 U.S. 191 (1980); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991); *FCC v. League of Women Voters*, 468 U.S. at 383.

None of these rules can even be explained, much less justified, as necessary to close loopholes. There is apparently no government interest served by the peculiar timing rules imposed by the flow-through provisions.[15/] And the

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15/ The government's explanation is that these rules were an accommodation to concerns of some associations that end-of-year individual notifications would be burdensome. That concern, of course, could have been fully addressed by permitting associations to provide notification in their newsletters and magazines (with perhaps a reminder on dues statements to look in a particular issue). In any event, permitting associations the option of sending end-of-year individual notifications, and the option of correcting earlier estimations at the end of the year,

allocation rule does not fit any of its purported justifications. If Congress had been concerned that associations might seek to shield their members from tax by paying for lobbying entirely from non-dues income, it could have fully prevented that by imposing an apportionment rule that, for example, imposed tax on members proportionate to their contributions to the association's income.[16/] If Congress had been concerned that lobbying expenditures funded from an association's independent business income would remain untaxed, it could have fully prevented that by subjecting any association business income spent to lobby to the generally applicable income tax, just as Congress did when it decided not to subsidize associations' unrelated business income.

If Congress had been that concerned that commercial businesses could avoid tax on their lobbying expenditures by providing funds to their association to lobby for them, Congress could have fully prevented that by reclassifying all such contributions as taxable to the companies making such contributions. The allocation rule does not even address that concern. The burden imposed by the allocation rule is not imposed by any requirement that association members pay tax on lobbying expenditures funded with their dues or contributions. The burden is imposed by the requirement that members pay tax on lobbying expenditures funded with income that was never theirs. Further, the allocation rule

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would have been fully consistent with Congress's asserted interest.

16/ Another method for ensuring that members are not shielded from their fair share of tax, that the IRS has relied on as a practicable method for decades, is to calculate the percentage of an association's total expenditures that is represented by lobbying (lobbying expenditures divided by total association expenditures) and reclassify that percentage of dues as non-deductible.

does not actually require companies that make contributions to associations for lobbying to pay tax on those contributions. Indeed, the rule actually undermines that goal because it simply requires that contributions be taxable to the members generally.[17/]

Finally, additional and independent First Amendment concerns are raised by the statute's delegation of unfettered discretion to the Secretary of the Treasury to impose the flat 35 percent underestimation penalty or permit associations that have underestimated lobbying expenditures in one year to include the "excess" in the following year's estimate. Neither the statute nor any agency rulings impede the Secretary from using that discretion to grant or deny waivers to reward or punish speech. The Secretary's only official statement, embedded in its Instructions for Form 990 (the income tax return for associations), is that: if the agency finds an association's underestimation *reasonable*, the agency *may permit* a waiver. No guidance is provided taxpayers, and no limits are imposed on the agency, with respect to what might constitute a "reasonable" underestimation or what circumstances would induce the Secretary to permit such a waiver. The Department remains impermissibly free under the statute, and its own rules, to grant waivers to associations that lobby for legislative initiatives it favors but to deny waivers to associations that lobby for results it opposes. *See Riley v. National Federation of the Blind*, 487 U.S. 781 (1988) (invalidating charitable solicitation regulation that did not sufficiently

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17/ For example, if a company contributed $100,000 to its association for lobbying, the tax on that contribution could be spread throughout the membership, permitting the *contributor* to pay only a small portion of that tax.

circumscribe the discretion of the licensing board); *Cox v. Louisiana*, 379 U.S. 536 (1965) (invalidating law permitting discretionary enforcement of ban); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (invalidating law permitting officials to waive compliance with ban at their discretion); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (invalidating law permitting officials to waive restriction on charitable solicitation).[18/]

This Court should grant *certiorari* to review this case in order to invalidate these tax provisions which are inconsistent with this Court's decisions, disregard the clear strictures imposed by the First Amendment, and unreasonably and unnecessarily impose greater tax burdens on association lobbying than on lobbying by others. This Court's guidance is necessary to explain to Congress, to state legislatures, and to the Department of the Treasury, the constitutional limits that must govern their actions when taxing protected speech – however currently unpopular the speakers.

18/ Because the challenged provisions *do* implicate First Amendment interests, these rules are also subject to heightened scrutiny under the Fifth Amendment's equal protection guarantee. *See Carey v. Brown*, 447 U.S. 455, 463 (1980). The government here asserts no interest, much less a compelling interest, in imposing greater tax burdens on association lobbying than on lobbying by individuals or commercial businesses. Therefore, these provisions also cannot survive equal protection scrutiny. ASAE's equal protection claim was raised before both the trial court, *see* Pet. App. 4a, and the court below, *see* ASAE Opening Br. p.34 n.25, and is therefore preserved.

II. THE COURT BELOW MISCONSTRUED *TWR*; THE DUAL STRUCTURE IT PROPOSES WOULD *NOT* AVOID THE UNCONSTITUTIONAL BURDENS IMPOSED BY THESE PROVISIONS.

The court below failed to appreciate the fundamental differences between the legal framework applicable in *TWR* and the legal framework applicable here. Its conclusion that an association "can altogether sidestep the specified dilemmas" and avoid the burdens on First Amendment rights imposed by the challenged provisions, by splitting itself into two organizations – "one that engages exclusively in lobbying on behalf of its members and one that completely refrains from lobbying" – is misconceived. *See* Pet. App. 6a. By "splitting" into two entities, charitable and educational organizations such as TWR could fully insulate themselves from any special burdens on their First Amendment rights. Here, because both the objectionable tax provisions and applicable regulations are different, splitting into two separate entities will not "achieve[] precisely what . . . the Constitution demands: a generally applicable tax system that, although it does not subsidize lobbying, imposes no burden on it by comparison with other activities." *Id.* Thus, the decision below leaves associations subject to special penalties for lobbying, with no means of insulating themselves from its affirmative burdens.

The tax provisions challenged in *TWR* rendered all contributions to a charity non-deductible if the charity engaged in a substantial amount of lobbying. As this Court recognized, charitable organizations were permitted to adopt a dual structure in which one organization lobbied and the other did not. The one that did not lobby would meet the requirements of § 501(c)(3), which permit it to receive tax-

free contributions. The one that lobbied would operate under the requirements of § 501(c)(4), which do not permit contributions to be tax-free. The dual structure therefore permits the charity to avoid the only burden *TWR* complained of, because it provides charities with a means of insulating contributions used for charitable purposes from the tax. All contributions to the nonlobbying organization in a dual structure remain fully deductible. *See TWR*, 461 U.S. at 544. *Accord FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

The tax scheme under which this dual structure operates places no additional burdens on the rights of either organization. The lobbying organization may fund lobbying through either non-deductible contributions, independently earned income, or a combination of both. Activities undertaken by the lobbying organization have no effect on the nonlobbying charitable organization. The only restrictions the IRS had imposed were that the two organizations must be separately incorporated and must keep records sufficient to show that tax-deductible contributions to the nonlobbying organization are not being funneled to the lobbying one. *See TWR*, 461 U.S. at 544 n.6. TWR had argued that the dual structure was insufficient protection because the Department *might* impose requirements that were unrelated to the purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying. The Court found the dual structure option sufficient because no such requirements *had* been imposed. *Id.*[19/]

19/ Under Department of the Treasury regulations, the nonlobbying organization is permitted to transfer funds or other goods to the lobbying organization. Such transfers are then treated as lobbying expenditures by

This case presents the question that the Court was not called on to address in *TWR*: whether a dual structure is adequate protection when it does *not* insulate speakers from special burdens that are not necessary to prevent tax-deductible contributions from being used for lobbying. A dual structure does not insulate speakers from special burdens here because the Department of the Treasury has adopted a regulation permitting it to disregard any such structure. The regulation provides:

> If a taxpayer, alone or with others, structures its activities with a principal purpose of achieving results that are unreasonable in light of the purposes of section 162(e)(1)(A) and section 6033(e), the Commissioner can recast the taxpayer's activities for federal tax purposes as appropriate to achieve tax results that are consistent with the intent of section 162(e)(1)(A), section 6033(e) (if applicable), and this section . . .

Treas. Reg. § 1.162-29(f) ("Anti-avoidance Rule"). The following subsection explains that "taxpayer" includes a tax-exempt organization subject to Section 6033(e). Treas. Reg. § 1.162-29(g).

The government's position is that this Anti-avoidance Rule applies even to organizations that formally segregate lobbying from nonlobbying activities through dual incorporation. Further, the government's position is that, pursuant to the rule, the Department may disregard any such dual structure unless the lobbying organization is funded

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the nonlobbying organization, unless the funds are earmarked for a nonlobbying purpose and separately tracked. *See* 26 C.F.R. § 56.4911-3, § 56.4911-4.

entirely with dues and contributions. Thus, contrary to the decision below, adopting a dual structure does not protect an association that lobbies from special tax burdens, and does not result in the income it spends to lobby being subjected to the generally applicable tax scheme.

Consider an association that adopts the dual structure set forth and relied upon by the court below and splits into a lobbying organization and a nonlobbying organization. If the lobbying organization is funded by both dues and independent business income earned by the lobbying organization, the IRS will disregard the dual structure for tax purposes and treat both organizations as a single association, subjecting it to the special tax provisions challenged here. Under these circumstances, the dual structure does not permit the organization to avoid any of the unconstitutional burdens imposed by these provisions. Association lobbying is not subjected to generally applicable taxes; it is subjected to special penalties because the provisions applicable to association lobbying withdraw *more* than the former tax subsidies for lobbying, imposing harsher taxes than the provisions applicable to other activities, including lobbying by others.

The only means by which an association can adopt a dual structure that will not be disregarded by the IRS is to create a lobbying organization that is funded entirely with member dues and contributions. But that restriction is entirely unnecessary to ensuring that dues and contributions spent to lobby are non-deductible. This is because the dues and contributions provided to the lobbying organization will be 100 percent non-deductible, so every dollar of dues or contributions that is spent for lobbying will be subject to tax – even if no such restriction applies. Effectively prohibiting

the lobbying organization from generating income from sales of goods and services and also spending *that* income to lobby, just as § 501(c)(4) organizations may, does not further the goal of ensuring that dues spent to lobby are not deducted.

Congress may constitutionally tax that income, to ensure that no tax subsidy is provided for lobbying, but it may do so only by subjecting it to the ordinary income tax scheme. Thus, Congress could classify any business income earned by the lobbying organization, and spent to lobby, as taxable under the generally applicable corporate income tax. But Congress has no legitimate interest in preventing associations from lobbying with earned business income, or impose affirmative burdens on them or on their members if they do.[20/] Under this Court's consistent jurisprudence, the First Amendment protects the speech and petition rights of corporations and associations, as well as individual people. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

Furthermore, preventing associations from lobbying with earned business income, or imposing additional burdens if they do, does not serve the only government interest asserted here – the withdrawal of former subsidies for lobbying. Nor is such a restriction even minimally sensible in a scheme that permits commercial businesses to spend

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20/ Congress also may not constitutionally impose a second tax on a lobbying organization's unrelated business income if it is spent to lobby, because that income is already subjected to the generally applicable corporate income tax.

their business income to lobby, without incurring affirmative burdens on themselves or their shareholders.

The court below either determined, in error, that the First Amendment permits such a restriction, or – based on a misunderstanding of how associations operate – assumed that the second, lobbying organization in a dual structure would necessarily have to be funded entirely from dues and contributions. In any event, in light of the Department of the Treasury's "Anti-avoidance Rule," which the court below did not strike down or meaningfully curtail, a dual structure cannot confer the constitutionally protected position to associations subject to the provisions challenged here that a dual structure was capable of conferring on TWR.

The decision below has therefore left a substantial sector subject to unconstitutional incursions on their First Amendment rights, on a continuing basis. Further, the appellate court's misconceptions with respect to this Court's First Amendment jurisprudence send a dangerous signal to Congress and to state legislatures looking for politically-safe sources of income and politically-unpopular targets to skewer – by penalizing and thereby discouraging their speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 4, 2000

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APPENDIX A

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 98-5563

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

November 9, 1999

Before: EDWARDS, Chief Judge, WALD and WILLIAMS, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS.

WILLIAMS, Circuit Judge: Before its amendment by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (the "1993 Act" or the "Act"), § 162(e) of the Internal Revenue Code ("I.R.C.") allowed businesses to deduct their direct lobbying expenditures as business expenses. In the 1993 Act, Congress amended I.R.C. § 162(e) so that lobbying expenses would no longer be deductible. 26 U.S.C. § 162(e) (1994). It also enacted several additional provisions to ensure that taxpayers could not evade the force of the Act by paying dues to tax-exempt organizations that would then conduct the desired lobbying activities. The American Society of Association Executives, a tax-exempt trade association that lobbies on behalf of its members, filed suit, alleging that these provisions placed an affirmative burden on its right to lobby, in violation of the First Amendment. The district court rejected

the constitutional challenge and granted the government's motion for summary judgment; we affirm.

* * *

Under the 1993 Act, a tax-exempt organization that engages in lobbying activities and is funded in part by membership dues and other contributions may either pay a tax on its lobbying activities (the so-called "proxy tax"), or may follow "flow-through provisions" aimed at making sure no contributor or dues payer takes a deduction with respect to funds used for lobbying. 26 U.S.C. § 6033(e) (1994).

The proxy tax, if the tax-exempt organization chooses that route, falls on all lobbying expenses as defined in § 162(e)(1) and is imposed at the highest marginal rate of the corporate income tax under I.R.C. § 11, now 35%. *Id.* § 6033 (e)(2)(A)(ii). If the organization chooses the flow-through alternative, it is required to provide donors, at the time of "assessment or payment" of dues or other contributions, with a "reasonable estimate" of the portion of the dues or contributions that is allocable to § 162(e)(1) expenditures. *Id.* § 6033(e)(1)(A)(ii). Donors are not allowed to take a deduction for the portion of their dues and contributions allocable to such expenditures. *Id.* § 162(e)(3).

To prevent organizations from circumventing the purpose of the flow-through provisions by artificially allocating their dues to non-lobbying activities, Congress enacted an "allocation provision." *Id.* § 6033(e)(1)(C)(i). This provision dictates that lobbying expenditures will be considered paid out of membership dues or "other similar amounts" to the extent that they exist. *Id.* So as to preclude the analogous manipulation across years (e.g., an organization might "prepay" lobbying expenses in excess of dues in one year and reduce its lobbying

expenses below that received from dues in the following years, thereby artificially increasing the deductions for which its members are eligible), a "carryover" provision dictates that any lobbying expenditures in excess of the dues or other amounts paid to the organization in one year will be treated as expenditures incurred during the following year and payable out of dues received during that year. *Id.* § 6033(e)(1)(C)(ii).

The organization must include on its annual tax returns the lobbying expenditures that it has incurred as well as the total amount of dues "to which such expenditures are allocable." *Id.* § 6033(e)(1)(A)(i). If a tax-exempt organization trying to follow the flow-through method in fact incurs lobbying expenditures in excess of the aggregate amount covered as nondeductible by its notices to dues payers for the year, the discrepancy will be subject to the flat 35% tax. *Id.* § 6033(e)(2)(A). The Secretary may (but evidently need not) "waive" this tax if the organization agrees to correct its mistaken estimate by "carrying over" the excess to the following year and allocating it to dues paid in that year. *Id.* § 6033(e)(2)(B).

The American Society of Association Executives is a nonprofit professional association that lobbies on behalf of about 23,000 association executives and staff members. It is tax-exempt under 26 U.S.C. § 501(c)(6), as a "business league [ ] ... not organized for profit." Thus it is subject to the lobbying tax provisions at issue in this case.

For its fiscal year ending June 30, 1994, the Society chose to apply the "proxy tax" to its lobbying expenditures, thus allowing its members and contributors full deductibility. On November 7, 1994 it submitted an amended tax return,

requesting a refund of the $56,900 paid as proxy tax, and claiming that the tax scheme was unconstitutional. After six months passed without action on the refund claim by the Internal Revenue Service, the Society brought suit in district court. It alleged that the scheme placed a burden on its freedom of expression in violation of the First Amendment, and that it discriminated against lobbying associations and in favor of individual businesses and private persons, in contravention of the Fifth Amendment.

The district court granted the government's motion for summary judgment, rejecting both the Society's claims. *See American Soc'y of Ass'n Executives v. United States*, 23 F. Supp. 2d 64 (D.D.C. 1998). On appeal, the Society argues only its First Amendment theory.

* * *

The Society and the government agree on certain general principles. Although the government has no obligation to subsidize speech, see, *e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), the courts will subject to "strict scrutiny" any affirmative burden that the government places on speech on the basis of its content. See, *e.g.*, *Leathers v. Medlock*, 499 U.S. 439, 447, 113 L. Ed. 2d 494, 111 S. Ct. 1438 (1991). The Society points to various effects of the proxy and flow-through choices that in its view affirmatively burden lobbying.

First, at least for association members in relatively low brackets, the flat 35% rate necessarily places a higher effective burden on lobbying through an association than the generally applicable corporate tax--a graduated rate starting at 15% and capped at 35%--places on direct lobbying. The government counters (in part) that a dues payer in the 35% bracket, and

even well below, can get more lobbying per pre-tax dollar by contributing to a lobbying association than by doing its own lobbying. This is because the dues payer gets a deduction for its full contribution to the entity, including the amount devoted to the tax payment itself. Whereas a dues payer can buy $100 worth of lobbying for $135 (i.e., $100 plus the $35 proxy tax), a corporation that is taxed at a 35% rate would have to use up $154 of pre-tax income in order to spend $100 on lobbying (65% of $154 = $100).[1] The Society contests these calculations, but we need not resolve the dispute, partly because the government figures would still leave dues payers in tax brackets lower than the effective rate of the proxy tax (brackets lower than 26% by the government's calculations) more burdened by the proxy tax than by the treatment of direct lobbying. An additional reason we need not resolve it is that, as we shall see, associations like the Society have an option that avoids any such possible burden.

Alternatively, argues the Society, the flow-through method subjects lobbying to a risk of non-neutral treatment. If an association overestimates its lobbying expenses, its dues payers will forfeit part of their deduction for nonlobbying business activities, without the possibility of recovering this deduction in the future. And if it underestimates lobbying expenditures, it is exposed to the proxy tax, from which it can escape only if the Secretary chooses to "waive" the tax and allow "carryover"

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[1]A firm that spends $100 on direct lobbying pays tax not only on the $100, but on the $35 needed to pay tax on the $100, and the $12.25 needed to pay tax on that $35, etc. The formula for the sum of an infinite geometric series is a + ar + ar2 + ar3 + ... = a/(1-r), so that a firm in the 35% bracket, seeking to generate $100 for lobbying, needs $100/(1-.35) or $154 in pre-tax income.

treatment. The Secretary has failed to adopt regulations setting forth clear sufficient conditions for the waiver. According to the Society, his only official statement on the subject consists of instructions for Form 990 (the income tax return for associations), in which he says that he may permit a waiver if the association's estimate was reasonable and the association agrees to add the excess to the following year's amount. See IRS Form 990, line 85h and Instructions (1998). The Society argues that, in light of the First Amendment right to lobby, the Secretary's discretion is far too broad to survive strict scrutiny.

Finally, the Society says that the allocation rules, by treating the association's lobbying expenditures as funded by dues or similar payments (to the extent available), regardless of their actual source, in effect limit the deductions that members can take for dues that the association spends on ordinary business activities. This, it says, violates the principle that the government may not condition the receipt of an otherwise available benefit on an entity's refraining from the exercise of its freedom of speech. See Perry, 408 U.S. at 597.

We do not reach these arguments, however, because a tax-exempt organization that engages in lobbying activities can altogether sidestep the specified dilemmas. A § 501(c)(6) association can avoid any alleged burden on its First Amendment rights by splitting itself into two § 501(c)(6) organizations--one that engages exclusively in lobbying on behalf of its members and one that completely refrains from lobbying. Whereas the lobbying wing can be funded by dues and contributions, for which members will not be able to take a deduction, the non-lobbying affiliate can be funded, at least in part, by deductible dues. This system achieves precisely what the Society says the Constitution demands: a generally applicable tax system that, although it does not subsidize

lobbying, imposes no burden on it by comparison with other activities.

If this option is available, the treatment of lobbying contested here is subject only to "rational basis" scrutiny, and, as we shall see, handily survives. In *Regan v. Taxation With Representation*, 461 U.S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983), the Supreme Court considered the operation of I.R.C. §§ 170(c)(2), 501(c)(3) and 501(c)(4). Sections 501(c)(3) and (4) define the characteristics of certain tax-exempt organizations, the key difference (for our purposes) being that "no substantial part of the activities" of a § 501(c)(3) organization may consist of lobbying, whereas no such limit applies to § 501(c)(4) organizations. The trade-off is that § 170(c)(2) permits taxpayers to deduct any contributions made to § 501(c)(3) organizations, but not to organizations that are tax-exempt under § 501(c)(4). Because the plaintiff organization in *Taxation With Representation* could conduct its lobbying activities through a § 501(c)(4) affiliate, and continue to receive deductible contributions as a § 501(c)(3) organization, the Court applied rational basis review and upheld the statute. See *Taxation With Representation*, 461 U.S. at 547; *see also Rust v. Sullivan*, 500 U.S. 173, 196-98, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)(upholding Congress's subsidy of family planning services even though the funding could not be used for abortion-related activities, on the basis that the grantee could still conduct such activities through programs that were "separate and independent" from those receiving federal funds). In contrast with the situation in *Taxation With Representation*, the Court in *FCC v. League of Women Voters*, 468 U.S. 364, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984), invalidated a grant conditioned on a broadcasting station's not "engaging in editorializing," on the basis that the

station could not "segregate its activities according to the source of its funding." 468 U.S. at 400-01.[2]

In *Taxation With Representation* the Court noted that the taxpayer organization must show that its § 501(c)(3) wing does not subsidize its § 501(c)(4) affiliate, so as to ensure that "no tax-deductible contributions are used to pay for substantial lobbying." 461 U.S. at 544 & n.6. The Court found, however, that the IRS's only requirements to that end--that the two organizations be "separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying"--were not "unduly burdensome." *Id.* at 545 n.6; see also *id.* at 553 (Blackmun, J., concurring) (stating that "as long as the IRS goes no further than this," the plaintiff's right to engage in lobbying has not been infringed).

An organization like the Society can similarly split into two § 501(c)(6) associations. Neither affiliate would forfeit its tax-exempt status, as the non-lobbying wing would clearly continue

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[2]One might wonder why a grant-dependent broadcast licensee could not create an independent affiliate and transfer to it, for fair market value, an entitlement to broadcast in specified time slots. At least one answer is that the FCC has traditionally barred broadcast licensees from creating de facto sublicensees by subdividing spectrum allocations or otherwise parceling out air time to third parties. See Howard A. Shelanski, The Bending Line Between Conventional "Broadcast" and Wireless "Carriage", *97 Colum. L. Rev. 1048, 1069-70 (1997);* 47 CFR § 73.3555 (1998) (requiring that the licensee "maintain[] ultimate control over the station's facilities, including specifically control over station finances, personnel and programming").

to be a "business league" for purposes of the statute, and the lobbying wing, so long as its activity is directed at furthering a business interest, would also remain tax-exempt under § 501(c)(6). See Rev. Rul. 61-177, 1961-2 C.B. 117 (stating that a corporation whose sole activity is to influence legislation relevant to a business interest is exempt under § 501(c)(6) if it otherwise meets the requirements of that section).

The Society argues, however, that the regulations promulgated in response to the 1993 Act block such a remedy. It points in particular to the Treasury Department's regulation precluding a taxpayer from "structuring its activities with a principal purpose of achieving results that are unreasonable in light of the purposes of section 162(e)(1)(A) and section 6033(e)." Treas. Reg. § 1.162-29(f)(1995). Assuming that this applies to an organization that formally segregates its lobbying from its nonlobbying activities through dual incorporation, we see no indication that this is in any way more onerous than the separation criteria referred to in *Taxation With Representation*. So long as the organization does not attempt to evade § 162(e)(1)(A)--by funneling resources to the lobbying wing from the non-lobbying wing--we do not see how it could run afoul of the regulation. In fact, a dual-entity structure is entirely consistent with Congress's intent in enacting the 1993 Act: to withdraw the deduction for lobbying expenses without affirmatively burdening the right to lobby.

Apart from its claims that the regulations unduly hamper the dual-entity strategy, the Society invokes *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 587-88, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983), for the idea that differential tax treatment of the press is subject to heightened scrutiny even when the taxpayer cannot prove the differential burdensome. Similarly, any subjection of lobbying

to differential treatment must meet heightened scrutiny. But *Taxation with Representation*, and the other cases cited above and using only rational basis scrutiny, were all decided after *Minneapolis Star* (indeed, *Taxation with Representation* was decided later the same Term). The Court evidently regards the dual incorporation option as obviating the need for heightened scrutiny. Even if we reframe the Society's objection as a claim that the need to adopt a dual incorporation is itself a "differential" (after all, non-lobbying associations that have multiple functions commonly need not subdivide), the Court's decisions necessarily reject the notion.

Accordingly, we ask simply whether the provisions bear "a rational relation to a legitimate governmental purpose." *Taxation With Representation*, 461 U.S. at 547. The parties agree on the legitimacy of withholding the benefits of tax deductibility from lobbying. And the scheme overall clearly bears a rational relation to that goal. For instance, the estimation provision, § 6033(e)(1)(A)(ii), allows taxpayers to continue to take a deduction for dues paid to tax-exempt organizations not allocable to lobbying. The carryover and allocation provisions, § 6033(e)(1)(C) ensure that taxpayers may not circumvent the Act by taking deductions for money that will fund lobbying activities, directly or indirectly. We find no constitutional violation.

* * *

The district court's order granting summary judgment for the defendant is

Affirmed.

[Asterisks throughout are reprinted from the original].

APPENDIX B

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES (ASAE), Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Civil Action No. 95-918 (SS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

October 29, 1998, Filed

OPINION

This action to recover a refund of $56,900 in income taxes, arising out of plaintiff's election to apply the "proxy tax" option in 26 U.S.C. § 6033(e)(2) to its lobbying expenditures in fiscal year 1994 is presently before the Court on summary judgment motions by both the plaintiff and the defendant. At a hearing held before this Court on September 25, 1998 both sides agreed that the questions before the Court are questions of law, that there are no factual issues to be resolved and, accordingly, that the Court should rule on the motions.

Plaintiff, the American Society of Association Executives ("ASAE"), is a tax-exempt trade association under 26 U.S.C. § 501(c)(6) composed of approximately 22,300 association executives and staff members. ASAE engages in lobbying on behalf of its members and contends that the enforcement provisions of the lobbying tax, codified at 26 U.S.C. §§ 162(e)(3), 162(e)(5)(C) and 6033(e), impose financial "penalties" on tax-exempt associations (and their members) that engage in lobbying and are, therefore, unconstitutional. ASAE

argues that the challenged provisions violate the First Amendment by deterring ASAE and its members from exercising their rights to freedom of expression and association and to petition the government. ASAE also argues that the challenged provisions violate the Equal Protection clause of the Fifth Amendment by favoring private individuals and for-profit corporations over tax-exempt associations. Although it only was affected by the proxy tax and recordkeeping provisions of the statute, ASAE states that because it is raising a facial challenge this Court has jurisdiction to consider the challenged provisions in their entirety and not merely the provisions to which ASAE was subjected.

I. Procedural History

This is not the first time that this case has been before this Court. In April 1994 this Court issued a Memorandum Opinion and Order in response to a declaratory judgment action challenging the lobbying tax brought by ASAE and ten other associations. In that action the plaintiffs asked this Court to declare the lobbying tax unconstitutional and to enjoin the Government from enforcing it. This Court held that the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), deprived it of jurisdiction over the case and that the two recognized exceptions to the AIA were inapplicable because: (1) plaintiffs had not shown that the Government could not prevail under any circumstances, as required by *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 8 L. Ed. 2d 292, 82 S. Ct. 1125 (1962); and (2) plaintiffs had alternative legal remedies available to them. See *South Carolina v. Regan*, 465 U.S. 367, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (1984)(recognizing exception to AIA where plaintiff is left with no alternative legal remedy).

Regarding their alternative legal remedies, the Court held that the plaintiffs could either elect to pay the "proxy tax" on tax-exempt associations created by § 6033(e) and then bring a tax refund action in the United States District Court, or if the plaintiffs elected not to pay the proxy tax and instead notified their members, the members could then bring individual suits challenging the requirements of §§ 162(e) and 6033(e) in the United States Tax Court. Accordingly, the Court dismissed the plaintiff's complaint based on a lack of subject matter jurisdiction under the AIA. See *American Society of Ass'n Executives v. Lloyd H. Bentsen*, 848 F. Supp. 245 (D.D.C. 1994) (hereinafter "ASAE I"). Familiarity with the Court's prior opinion is assumed.

Following this Court's decision in ASAE I plaintiff chose not to notify its members and instead paid its proxy tax liability for fiscal year 1994, which was $56,900. ASAE subsequently submitted an amended return to the Internal Revenue Service ("IRS") requesting a refund of the $56,900 on the ground that the lobbying tax provisions applicable to tax-exempt associations violate the First and Fifth Amendments to the United States Constitution. After six months had passed without a response from the IRS, ASAE filed this lawsuit. In its complaint, filed on May 15, 1995, ASAE requests: (1) a refund of the $56,900 plus interest, costs and attorney's fees; and (2) injunctive relief preventing the Government from enforcing the lobbying tax against it or its members. See Cmplt. p. 17.

II. The Lobbying Tax

The challenged provisions, codified at 26 U.S.C. §§ 162(e)(3), 162(e)(5)(C), and 6033(e), were enacted by section 13222 of the Omnibus Budget Reconciliation Act of 1993 (H.R. 2264, 103d Cong., 1st Sess. (1993)) (the "Act"). Prior to

passage of the Act, section 162(e) of the Code allowed businesses to deduct direct lobbying expenses as business expenses. The Act amended the Code to withdraw the deduction for lobbying expenses incurred by businesses. The Act also contains provisions specifically aimed at enforcing Congress' mandate against certain tax-exempt membership organizations that engage in lobbying. Those tax-exempt organizations previously had been able to deduct their lobbying expenses while their members could deduct their membership dues. Congress concluded that allowing such tax-exempt organizations to deduct their lobbying expenses amounted to a government subsidy of their lobbying activities.

In addition to withdrawing the tax deduction, the Act also includes provisions designed to close certain loopholes thus preventing the affected taxpayers from skirting Congress' intent. These enforcement provisions include: (A) the "flow through provision;" (B) the "allocation provision;" (C) the "proxy tax;" (D) the "estimation provision;" (referred to by ASAE as the "overestimation penalty" and the "underestimation penalty"); and (E) the "carryover provision."

A. Flow Through Provision § 162(e)(3)

The flow through provision provides:

> No deduction shall be allowed under subsection (a) for the portion of dues or other similar amounts paid by the taxpayer to an organization which is exempt from tax under this subtitle which the organization notifies the taxpayer under § 6033(e)(1)(A)(ii) is allocable to expenditures to which paragraph (1) applies.

26 U.S.C. § 162(e)(3). This provision was designed to prevent taxpayers who use tax-exempt associations to lobby on their behalf from retaining a tax subsidy for their lobbying activities through the tax-deductible dues paid to such associations. Thus, it would prevent lobbying expenses not otherwise deductible from being made deductible merely by conducting lobbying through a tax-exempt association. A member of such an association may not deduct that portion of the dues paid which is attributable to the association's lobbying expenses.

B. Reporting Requirements and Allocation Provision § 6033(e)(1)

The reporting requirements of § 6033(e)(1) work in conjunction with the flow through provision. Section 6033(e)(1) requires tax-exempt organizations to include on their annual tax returns the total amount of their lobbying expenses and the total amount of dues allocable to lobbying. 26 U.S.C. § 6033(e)(1)(A)(i). The organizations also are required under the section to notify their members of the non-deductible portion of the members' dues. 26 U.S.C. § 6033(e)(1)(A)(ii).

The section also adds an "allocation provision" designed to prevent taxpayers from evading the withdrawal of the tax deduction for lobbying expenses. The provision requires that when calculating the percentage of dues attributable to lobbying, the association must treat the lobbying expenses as having been funded first by membership dues rather than from some other form of income. The provision states as follows:

For the purposes of this paragraph--

(i) In General--Expenditures to which section 162(e) applies shall be treated as paid out of dues or other similar amounts to the extent thereof.

26 U.S.C. § 6033(e)(1)(C). This provision is justified on the basis that a restriction is necessary to avoid skirting Congress' intent. It is argued that without the rule, taxpayers could claim deductions for dues paid to tax-exempt organizations that engage in lobbying, because the organization could simply allocate its lobbying expenses to non-dues income, which may be tax-exempt.

C. Notification Provision and Proxy Tax § 6033(e)(2)

Section 6033(e)(2) gives tax-exempt associations the option of (1) placing the burden and responsibility of complying with the restriction on their members through a notification provision, or (2) paying the tax themselves in the form of a "proxy tax," which would not interfere with the members' right to deduct membership dues. The pertinent parts of section 6033(e)(2) provide:

> If an organization--
>
> (i) elects not to provide the notices described in paragraph (1)(A) for any taxable year, or
>
> (ii) fails to include in such notices the amount allocable to expenditures to which section 162(e)(1) applies (determined on the basis of actual amounts rather than the reasonable estimates under paragraph (1)(A)(i)), then there is hereby imposed on such organization for such taxable year a tax in the amount equal to the product of the highest rate of tax imposed by section 11

> for the taxable year and the aggregate amount not included in such notices by reason of such election or failure.

26 U.S.C. § 6033(e)(2). As drafted, the notification provision and the proxy tax work in conjunction to further the IRS's goal of enforcing the withdrawal of the business deduction for lobbying expenses. Affected associations have the option of reporting to their members the non-deductible portion of their dues, or if such reporting imposes too heavy a financial burden, paying the tax through the "proxy" provision, as ASAE did in this case.

D. The Estimation Provision

The estimation provision, § 6033(e)(1)(A)(ii), requires tax-exempt organizations that elect to notify their members (in lieu of paying the proxy tax) to estimate their lobbying expenses for the coming year and to make the notification to members concurrently with dues assessments or payments. The provision provides that the organization "shall, at the time of assessment or payment of such dues or other similar amounts, provide notice to each person making such payment which contains a reasonable estimate of the portion of such dues or other similar amounts to which such expenditures are allocable." 26 U.S.C. § 6033(e)(1)(A)(ii).

E. The Carryover Provision

The carryover provision, § 6033(e)(1)(C)(ii), requires tax-exempt organizations to account for any lobbying expenses in excess of dues collected in a particular year by carrying the excess over and paying it with dues collected the following year. The provision provides that "if expenditures to which

section 162(e)(1) applies exceed the dues or other similar amounts for any taxable year, such excess shall be treated as expenditures to which section 162(e)(1) applies which are paid or incurred by the organization during the following taxable year." 26 U.S.C. § 6033(e)(1)(C)(ii).

The enforcement provisions apply only to tax-exempt organizations and their members. See 26 U.S.C. §§ 162(e)(3), 6033(e)(1)(B)(i). ASAE does not challenge the constitutional power of Congress to withdraw tax-exempt status. Nor does it attack the portions of the Act that apply to commercial businesses. However, it contends that the enforcement provisions, as applied to tax-exempt organizations, are unconstitutional because they impermissibly hinder the exercise of its First Amendment rights and violate its Fifth Amendment right to equal protection.

III.. Discussion

A. Summary Judgment Standards

A party is only entitled to summary judgment if the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact. *Aka v. Washington Hospital Center*, 332 U.S. App. D.C. 256, 1998 U.S. App. LEXIS 24929, 156 F.3d 1284, 1998 WL 698396 (D.C. Cir. 1998); *Tao v. Freeh*, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994). To award summary judgment the court must accept all evidence offered by the non-moving party as presumptively valid and draw all justifiable inferences in the non-movant's favor. *Smith-Haynie v. District of Columbia*, 332 U.S. App. D.C. 182, 155 F.3d 575, 1998 WL 642582, (D.C. Cir. 1998).

B. First Amendment Claims

As is often the case in First Amendment challenges, the parties conflict over the appropriate standard of review, with ASAE arguing that the Court should apply a "strict scrutiny" analysis and the Government contending that the proper standard is the "rational basis" test. ASAE contends that the Court should apply the strict scrutiny analysis because: (1) the challenged provisions do not merely withdraw a subsidy from trade associations that lobby, but impose an affirmative burden or "penalty" on their speech; and (2) the challenged provisions are content based. The Government argues that Congress simply has denied a tax subsidy for lobbying without imposing an affirmative burden and without regard to the view point of the lobbyist, and that, therefore, its action does not implicate the First Amendment and only is subject to rational basis review.

There are two main standards of review in First Amendment jurisprudence: "strict scrutiny" for content-based restrictions on speech; and "intermediate scrutiny" for content-neutral restrictions. *Blount v. Securities and Exchange Commission*, 314 U.S. App. D.C. 52, 61 F.3d 938, 941-42 (D.C. Cir. 1995)(citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)). Strict scrutiny requires that the regulations at issue be narrowly tailored to serve a compelling state interest. *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 353 (D.C. Cir. 1998). Under intermediate scrutiny a statute will be upheld "if it furthers an important government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377, 20

L. Ed. 2d 672, 88 S. Ct. 1673 (1968); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). However, the regulation "need not be the least restrictive means of doing so." *Ward*, 491 U.S. at 798.

Although strict scrutiny and intermediate scrutiny are the two principal standards for analyzing statutes under the First Amendment, the Supreme Court has also developed other standards for analyzing the restriction of speech depending on the particulars of the speech or the type of regulation at issue. In analyzing statutes involving taxation or the allocation of public funds the Supreme Court has applied a standard even more deferential than intermediate scrutiny. In *Regan v. Taxation With Representation*, 461 U.S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) ("TWR"), a case involving First Amendment and Equal Protection challenges to an internal revenue statute which granted tax exemptions for certain non-profit organizations that did not engage in substantial lobbying, the Supreme Court held that "statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose." *Id.*, 461 U.S. at 546. In *Cammarano v. United States*, 358 U.S. 498, 3 L. Ed. 2d 462, 79 S. Ct. 524 (1959), a case involving, inter alia, a First Amendment challenge to a Treasury Regulation which provided that sums of money expended by individual or corporate income taxpayers for defeat of legislation were not deductible from gross income, the Supreme Court held that the statute at issue was constitutional so long as its purpose was not to "suppress[] dangerous ideas." *Id.*, 358 U.S. at 512 (quoting *Speiser v. Randall*, 357 U.S. 513, 519, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958)).

The Supreme Court applied this lower rational basis standard in these cases because of the broad authority of the legislature in the area of taxation and the allocation of public funds, noting in TWR that "legislatures have especially broad latitude in

creating classifications and distinctions in tax statutes," *Id.*, 461 U.S. at 547, and in *Cammarano* that the statute at issue "appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned." *Id.*, 358 U.S. at 513; see also *Rust v. Sullivan*, 500 U.S. 173, 192, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) ("The Government can without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program").

Despite the broad authority of Congress in these areas, not all tax and public funding statutes are analyzed under the rational basis test. In a case involving a tax on the press, the Supreme Court applied a strict scrutiny standard, noting that "differential taxation of the press... places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 585, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). However, the Supreme Court later explained this case as meaning only that strict scrutiny must be applied to regulations that target a small subset of media organizations in ways that threaten to "distort the market for ideas." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 660, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)(determining that intermediate scrutiny must apply); see also *BellSouth Corp. v. F.C.C.*, 330 U.S. App. D.C. 109, 144 F.3d 58, 68 (D.C. Cir. 1998).

After reviewing the parties' papers and hearing argument, this Court concludes as it did in ASAE I, that the challenged provisions do not impose "penalties" on tax-exempt associations that engage in lobbying, but merely enforce the decision of Congress to eliminate the lobbying subsidy. While ASAE points out in its papers (as it did at oral argument) that "there are readily available alternatives that would be more effective in patching loopholes without imposing additional burdens on speech," Pltf's Memorandum in Opposition to Defendant's Motion for Summary Judgment p. 13, this Court notes that even intermediate First Amendment scrutiny (a higher level of scrutiny than the Court has applied in this case) does not entail a "least restrictive means analysis." *BellSouth*, 144 F.3d at 70. Congress was not required to enact the statute that imposed the lowest cost on ASAE. Its failure to do so does not constitute a "penalty" and would only do so if the statute denied ASAE "an independent benefit on account of its intention to lobby," see *TWR*, 461 U.S. at 545, which this Court concludes it does not.

The Court also rejects ASAE's contention that the challenged provisions discriminate on the basis of the content of the taxpayer's speech. ASAE alleges that the provisions unconstitutionally hinder "speech about legislation." Pltf's Memorandum p. 22. However, speech about legislation encompasses the entire spectrum of possible viewpoints and is, therefore, viewpoint neutral. In TWR the Supreme Court upheld a statute similar to the provisions at issue here[1] against a First Amendment challenge. The Court found the challenged

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[1]As noted above the statute at issue in TWR was an internal revenue statute granting a tax exemption to certain non-profit organizations that do not engage in substantial lobbying.

statute to be content neutral, stating that "the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'" *Id.*, 461 U.S. 541 (quoting *Cammarano*, 358 U.S. 498 at 513). Likewise, this Court concludes that in enacting these provisions Congress simply has eliminated the tax subsidy for lobbying without regard to the point of view of the lobbyist.

Thus, even after drawing all inferences in favor of the plaintiff, as must be done on this summary judgment motion, this Court holds that the rational basis test is the appropriate standard of review. As this Court stated in *ASAE I*:

> Upon close examination of this case it becomes obvious that this is less an instance of penalizing the exercise of a fundamental right than a case of Congress deciding not to subsidize the exercise of that right. The United States is not obligated to subsidize any person's lobbying.
>
> The Act is not a restriction on the content of speech. The Act does not discriminate against plaintiffs if they seek to influence legislation; the Act simply advances Congress' purpose that such speech not be paid for with pre-tax dollars. Neither does the Act single out particular ideas.

ASAE I, 848 F. Supp. at 249. This is essentially the same reasoning applied in *TWR* where the Supreme Court held that the District of Columbia Court of Appeals' opinion "suggests that strict scrutiny applies whenever Congress subsidizes some speech but not all speech. This is not the law." *Id.* 461 U.S. at 548.

Accordingly, this Court concludes that the challenged provisions of the lobbying tax must be rationally related to a legitimate government interest in order to be constitutional. For the reasons set forth in ASAE I (and quoted below) this Court holds that the provisions are rationally related to Congress' intent to eliminate the subsidy for lobbying.

Without the allocation, estimation and carryover provisions that implement the flow-through and notification rules, taxpayers could evade the Act's withdrawal of the business deduction for lobbying expenses by paying membership dues to § 501(c)(6) tax-exempt associations that would lobby on their behalf. Because of its tax-exempt status, the association would pay no tax on the membership dues and the members would be able to deduct the dues under 26 U.S.C. § 162(a). Congress enacted the flow-through and notification rules along with the allocation, estimation and carryover provisions to close this loophole.

While it is possible that there may have been a less costly or more efficient way of eliminating the subsidy for lobbying, Congress was not required to enact it. ASAE's papers are rife with "less convoluted," "less burdensome," "less complicated," and "more effective" ways Congress could have withdrawn the business tax deduction for lobbying expenses. However, ASAE's contention that Congress must use a "tailored mechanism," see Pltf's Memorandum p. 20, or a "precise" method to "remove [] a tax exemption," see Pltf's Memorandum p. 21 n. 20, is without merit.

This Court concludes that the challenged provisions fail to rise to the level of a constitutional violation, and that this Court is not the proper forum for an attempt to rewrite the legislation that has been enacted. Therefore, this Court finds no basis to

alter its prior ruling on this issue and reiterates those conclusions here:

> The principal change to the lobbying landscape wrought by the Act is that speech aimed at effecting legislative change--lobbying-- must now be paid for with after tax money. Sections 162(e)(3) and 6033(e) do not discriminate on the basis of content of speech, therefore they do not implicate the First Amendment.

ASAE I, 848 F. Supp. at 249.

C. Equal Protection

The dispute over which standard of review to apply to ASAE's equal protection claim has already been resolved. In ASAE I this Court held that because the lobbying tax did not implicate the First Amendment, the case did not involve the deprivation of a fundamental right and as a result, the challenged provisions should be analyzed under the rational basis test. See *ASAE I*, 848 F. Supp. at 249. Applying the rational basis test this Court held that:

> [t]he Act is rationally related to Congress' intent to eliminate a tax subsidy for lobbying expenses. Fairly read, the enforcement provisions are a means to that end. . . It is clear that without some enforcement mechanism, it would be difficult to ensure that taxpayers comply with the withdrawal of the lobbying expense deduction. The Act, therefore, is rationally related to raising revenue and closing a potential loophole in the tax laws.

Id. Although in so holding the Court was giving the most liberal interpretation of the law and facts in favor of the United States, as required by Williams Packing, the Court adheres to its prior holding even after drawing all inferences in favor of ASAE as must be done on this summary judgment motion.

D. Facial Challenge to the Statute

In addition to its challenge to the "proxy tax" provision, ASAE has also challenged other provisions of the lobbying tax. Specifically, ASAE argues that: (1) the notification provisions (consisting of the allocation provision, the carryover provision and the estimation provision) are unconstitutional; (2) the provision subjecting research and monitoring expenditures to the lobbying tax if the association later engages in lobbying on a related subject, § 162(e)(5)(C), penalizes lobbying and violates the First Amendment; and (3) the recordkeeping and reporting requirements, § 6033(e)(1), which require associations with lobbying expenses to track those expenses throughout the year and require associations which choose not to pay the proxy tax to estimate their lobbying expenses and dues receipts and to mail notice to each member, unduly burden expressive activities and violate the First Amendment.

Because ASAE paid the proxy tax it was not subject to any of these provisions, with the exception of the recordkeeping and reporting requirements. While ASAE has failed to set forth exactly how it was burdened by the recordkeeping and reporting requirements,[2] this Court nonetheless concludes that

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[2]ASAE's president R. William Taylor stated in his June 8, 1995 Declaration that the recordkeeping requirements of the law impose a considerable burden on ASAE, but neither he nor ASAE have provided the exact cost of the research and

because they merely adopt the standard in 26 U.S.C. § 6001, which applies to all taxpayers, the requirements do not unduly burden expressive activities and are therefore constitutional.

The Government argues that ASAE lacks standing to challenge the research and monitoring provision and those portions of the notification provisions which were not applied to it because neither ASAE nor its members have incurred any of the "penalties" which ASAE contends flow from those provisions. ASAE argues that it does have standing to challenge the research and monitoring and notification provisions, and that this Court has jurisdiction to rule on the challenge, because it is raising a facial challenge to the entire statute.

Although the Court finds it unlikely that the other provisions of the lobbying tax challenged by ASAE would run afoul of the First Amendment under the rational basis test, the Court declines to scrutinize the constitutionality of those provisions of the lobbying tax that are not before it in this case. As the Supreme Court recently held in a case involving a facial challenge to 20 U.S.C. § 954(d)(1):

> [u]nless and until [the statute] is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969)("We will not now pass upon the constitutionality of these regulations by envisioning the most extreme

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recordkeeping requirements for fiscal year 1994. See Taylor Declaration of June 8, 1995 p. 16.

applications conceivable, but will deal with those problems if and when they arise") (internal citation omitted).

National Endowment for the Arts v. Finley, 524 U.S. 569, 141 L. Ed. 2d 500, 118 S. Ct. 2168, 2179 (1998). Accordingly, the Court's ruling only extends to those provisions actually applied to ASAE.

E. Injunctive Relief

ASAE has also requested injunctive relief. As noted in this Court's prior opinion, the AIA deprives the Court of jurisdiction over suits to restrain the assessment or collection of taxes. If the Court had found the challenged provisions unconstitutional, then the Government would be unable to prevail under any circumstances, the Williams Packing exception to the AIA would apply and injunctive relief potentially would be available to ASAE. However, that is not the case here since the Court has held that the challenged provisions pass constitutional muster.

ASAE concedes that in order for this Court to grant injunctive relief, the Court would have to find the challenged provisions unconstitutional. See Pltf's Memorandum in Opposition p. 10 n.8 ("Thus, if this Court finds these provisions unconstitutional, it will have decided all issues material to future enforcement. Therefore, the exception to the Anti-Injunction Act for injunctive relief in cases where the government's position will not prevail, recognized in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 8 L. Ed. 2d 292, 82 S. Ct. 1125 (1962) would apply."). Accordingly, because the AIA deprives this Court of jurisdiction over plaintiff's request for injunctive relief, that request must be and hereby is denied.

IV. Conclusion

For the reasons set forth above this Court holds that the challenged provisions of the lobbying tax, 26 U.S.C. § 162(e)(3), 162(e)(5)(C) and 6033(e) are constitutional as applied to ASAE and are constitutional on their face. Accordingly, the motion of ASAE is denied in its entirety and the motion of the United States is granted. An appropriate order is attached.

Date: 10/28/98

Stanley Sporkin
United States District Judge

APPENDIX C

26 U.S.C. § 162

* * *

(e) Denial of deduction for certain lobbying and political expenditures.—

(1) **In general.**—No deduction shall be allowed under subsection (a) for any amount paid or incurred in connection with—

(A) influencing legislation,

(B) participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office,

(C) any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums or

(D) any direct communication with a covered executive branch official in an attempt to influence the official action or positions of such official.

* * *

(3) **Application to dues of tax-exempt organizations.**—No deduction shall be allowed under subsection (a) for the portion of dues or other similar amounts paid by the taxpayer to an organization which is exempt from tax under this subtitle which the organization notifies the taxpayer under section 6033(e)(1)(A)(ii) is allocable to expenditures to which paragraph (1) applies.

(4) **Influencing legislation.**—For purposes of this subsection—

(A) **In general**.—The term "influencing legislation" means any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation.

(B) **Legislation.**—The term "legislation" has the meaning given such term by section 4911(e)(2).

(6) **Covered executive branch official.**—For purposes of this subsection, the term "covered executive branch official" means—

(A) the President,

(B) the Vice President,

(C) any officer of employee of the White House Office of the Executive Office of the President, and the 2 most senior level officers of each of the other agencies in such Executive Office, and

(D)(i) any individual serving in a position in level I of the Executive Schedule under section 5312 of title 5, United States Code, (ii) any other individual designated by the President as having Cabinet level status, and (iii) any immediate deputy of an individual described in clause (i) or (ii).

* * *

26 U.S.C. § 6033

* * *

(e) **Special rules relating to lobbying activities.—**

(1) **Reporting requirements.—**

(A) **In general.**—if this subsection applies to an organization for any taxable year, such organization—

(i) shall include on any return required to be filed under subsection (a) for such year information setting forth the total expenditures of the organization to which section 162(e)(1) applies and the total amount of the dues or other similar amounts paid to the organization to which such expenditures are allocable, and

(ii) except as provided in paragraphs (2)(A)(i) and (3), shall, at the time of assessment or payment of such dues or other similar amounts, provide notice to each person making such payment which contains a reasonable estimate of the portion of such dues or other similar amounts to which such expenditures are so allocable.

(B) **Organizations to which subsection applies.—**

(i) **In general.**—This subsection shall apply to any organization which is exempt from taxation under section 501 other than an organization described in section 501(c)(3).

(ii) **Special rule for in-house expenditures.**—This subsection shall not apply to the in-house expenditures (within the meaning of section 162(e)(5)(B)(ii) of an organization for a taxable year if such expenditures do not exceed $2,000. In determining whether a taxpayer exceeds the $2,000 limit under this clause, there shall

not be taken into account overhead' costs otherwise allocable to activities described in subparagraphs (A) and (D) of section 162(e)(1).

(iii) **Coordination with section 527(f).**—This subsection shall not apply to any amount on which tax is imposed by reason of section 527(f).

(C) **Allocation.**—For purposes of this paragraph—

(i) **In general.**—Expenditures to which section 162(e)(1) applies shall be treated as paid out of dues or other similar amounts to the extent thereof.

(ii) **Carryover of lobbying expenditures in excess of dues.**—If expenditures to which section 162(e)(1) applies exceed the dues or other similar amounts for any taxable year, such excess shall be treated as expenditures to which section 162(e)(1) applies which are paid or incurred by the organization during the following taxable year.

(2) **Tax imposed where organization does not notify.**—

(A) **In general.**—If an organization—

(i) elects not to provide the notices described in paragraph (1)(A) for any taxable year, or

(ii) fails to include in such notices the amount allocable to expenditures to which section 162(e)(1) applies (determined on the basis of actual amounts rather than the reasonable estimates under paragraph (1)(A)(ii)), then there is hereby imposed on such organization for such taxable year a tax in an amount equal to the product of the highest rate of tax imposed by section 11 for the taxable year and the aggregate amount not included in such notices by reason of such election or failure.

(B) **Waiver where future adjustments made.**—The Secretary may waive the tax imposed by subparagraph (A)(ii) for any taxable year if the organization agrees to adjust its estimate under paragraph (1)(A)(ii) for the following taxable year to correct any failures.

(C) **Tax treated as income tax.**—For purposes of this title, the tax imposed by subparagraph (A) shall be treated in the same manner as a tax imposed by chapter 1 (relating to income taxes).

(3) **Exception where dues generally nondeductible.**—Paragraph (1)(A) shall not apply to an organization which establishes to the satisfaction of the Secretary that substantially all of the dues or other similar amounts paid by persons to such organizations are not deductible without regard to section 162(e).